HIGH COURT OF UTTARANCHAL AT NAINITAL

(Court's order whether the case is or not approved for reporting.)

(Chapter VII Rule 32 (2)(b)

Description of the Case.

C-482 No. 878 of 2006

Arun Kumar Sharma

and another.

Vs.

State & another.

Approved for reporting.

_____

Not approved for reporting

Dated of decision 15.12.2006

Initial of Judge

HIGH COURT OF UTTARANCHAL AT NAINITAL

C-482 NO. 878 OF 2006

1. Arun Kumar Sharma,
   S/o Shri Hari Prakash Shrma,
   R/o 161/1 Sonalipuram, Roorkee, District - Haridwar.
2. Subodh Kumar Sharma, S/o Shri Hari Prakash Sharma, R/o 161/1 Sonalipuram, Roorkee, District-Haridwar. .....Applicants.

Vs.

1. State of Uttaranchal, through its Secretary (Home) Dehradun.
2. Smt. Shyamlata, W/o late Jagmohan Lal, R/o 47, Uncha Kuwa, Pashchimi Rajputana, P.S. Gannahar, Roorkee, District-Haridwar. .....Respondents.

Hon'ble Rajesh Tandon, J.

Heard Sri Arvind Vashishta, counsel for the applicants, Sri S.K. Agarwal, Sr. Advocate appearing for the respondent no. 2 and A.G.A. for the State.

2. By the present application filed under Section 482 of the Code of Criminal Procedure, the applicants have prayed for quashing the order dated 16th October, 2006 as well as entire proceedings pending before the Magistrate concerned.

3. Briefly stated, a suit being O.S. No. 78 of 2004 was filed by the applicants praying that they may not be

disposed except in accordance with law as they are continuing as a tenant and paying the rent to the extent of Rs. 250/- per month from the year, 1999.

4. Smt. Shyamlata has filed a written statement on 14.02.2005. In paragraphs no. 3 and 4 of the written statement, she has admitted the applicant to be a licencee and not the tenant of the premises. On the other hand, she has stated that the applicants are licencees. The relevant paragraph to that effect is quoted below:-

> "यह कि कभी किसी प्रकार से प्रतिवादनी ने वादी को विवादित सम्पत्ति किराये पर नहीं दी और विवादित सम्पत्ति में उपरोक्त प्रकार से वादी अपने भाई गैर फरीक मुकदमा सुबोध कुमार के साथ ही आने जाने लगा था। और उपरोक्त प्रकार से वादी का अध्यासन विवादित सम्पत्ति पर केवल अनुज्ञप्ति धारी के रूप में चला आ रहा था।"

5. In paragraph 26 of the written statement, she has stated that a Suit No. 12 of 2005 Shyamlata Vs. Arun Kumar has been filed for possession before the Civil Judge Roorkee and the same is pending.

6. In nutshell, therefore, both the parties are claiming their rights in the suit. By the suit filed by the applicants, they have claimed the relief against the forceful dispossession whereas in the suit filed by the respondent no. 2 the recovery of possession has been claimed from the applicants.

7. After the institution of the aforesaid suit, FIR was lodged on 4th June, 2004 under Section 420, 467, 466, 471, 323, 504 and 506 I.P.C. stating therein that few

receipts were manufactured by the applicants and the respondent was threatened to sign the same. During the investigation, it was found that no case is made out against the applicants and therefore a final report was submitted by the police authorities on 29th April, 2005. The relevant portion of the final report is quoted below:

> "श्रीमान् जी निवेदन है कि दिनांक 4.6.2004 को वादी ने थाने पर रिपोर्ट लिखाई कि मुलजिमान ने उसकी दुकान के किराये की रसीद फर्जी तैयार कर ली हैं उसके साथ मार पीट की गाली गलौच की व जान से मारने की धमकी दी। विवेचना में पाया कि इस सम्बन्ध में एक वाद दुकान के सम्बन्ध में सिविल जज रूड़की में विचाराधीन है तथा विवादित रसीद न्यायालय में दाखिल है न्यायालय द्वारा रसीद हस्तलेख विषेषज्ञ से मिलान कराने हेतु नहीं दी है तथा मुकदमा न्यायालय में काफी समय तक चलेगा। ऐसी सूरत में विवेचना बेजवह है अतः द्वारा एफ आर समाप्त की जाती है। मंजूर फरमाई जाये।"

8. The respondent no. 2 has lodged the protest report on 12.12.2005 against the said final report dated 29th April, 2005. On the said protest, the order was passed on 13th March, 2006 directing for further investigation under the provisions of Section 173 (8) of the Code of Criminal Procedure. Against this order dated 13.3.2006, the applicants have preferred a revision before this Court being Criminal Revision No. 70 of 2006. The observations made by this Court on 1st August, 2006 reads as under:

> "*9. Having considered the arguments advanced by the learned counsel for the parties, I am of the view that in the instant case as very simple matter has been unnecessarily complicated by the Officers of*

the Court. The Civil Judge (J.D.) Roorkee by passing the two contradictory orders dated 6-8-2004 and 14-9-2004 has created chaos and on account of these two contradictory order the proceedings pending before the two different courts are languishing for no rhyme and reason. At the same time the Judicial magistrate while passing the impugne dorde rhas also not applied his mind and passed the order in a cursory manner. The Judicial Magistrate before passing the impugned order should have taken into accont the relevant provisions of law. I am of the view that the impugned order passed by the Judicial Magistrate is not sustainable in the eye of law.

10- I, accordingly, set aside the impugned order passed by the Judicial Magistrate rejecting the Final Report and direct the Judicial Magistrate to decide the matter afresh relating the Final Report filed by the Investigating Officer in accordance with law."

9. In view of the aforesaid, the Magistrate concerned was directed to investigate into the matter again and he was directed to pass fresh order relating to the final report.

10. Counsel for the applicants -Sri Arvind Vashisth has submitted that in the order dated 1st August, 2006,

the order passed for proceeding under Section 173 (8) of the Code of Criminal Procedure was set aside as stated above and the Magistrate concerned was left only to pass fresh order relating to the final report and no further investigation, therefore, was required in the matter. Still another criminal revision No. 51 of 2006 was filed by the same applicants where it was directed in paragraph 11 to the following effect:-

> *11. I, therefore, without entering into further controversy in the matter, direct the Civil Judge (J.D.), Roorkee to issue the direction to the Investigating Officer of the criminal case to be present before the court along with a hand writing expert on a particular date to be fixed by the trial court. The trial Court should also direct the fingerprint expert to take photographs of the disputed documents as well as the specimen signature of Smt. Shyamlata. The trial Court should also dispose of the Civil Suit No. 78/2004, Arun Kumar Sharma Versus Shyamlata, in accordance with law."*

11. In view of the aforesaid order, the Civil Judge, was directed to issue directions to the Investigating Officer of the Criminal case to be present before the Court along with the hand-writing expert on a particular date to be fixed by the trial Court. Further direction was made that the trial Court shall direct the fingerprint expert to take photographs of the disputed documents as well as the specimen signature of Smt. Shyamlata.

12. Thereafter, on 16th September, 2006 the investigation has proceeded.

13. Counsel for the applicants-Sri Arvind Vashist has submitted that on 16th September, 2006, the investigation has proceeded in pursuance of the order dated 29th April, 2005, which was the subject matter in the final report dated 13th March, 2006, which was also the subject matter in Criminal Revision No. 70 of 2006 and the same was set aside. The report as under:

> "श्रीमान जी निवेदन है कि मुकदमा उपरोक्त की विवेचना तत्कालीन थानाध्यक्ष श्री डी0 एस0 पवार वं उनके स्ाानान्तरण के उपरान्त थानाध्यक्ष श्री योगेन्द्र सिंह द्वारा की गयी। जिनके द्वारा मुकदमा उपरोक्त में अन्तिम रिपोर्ट संख्या 17 दिं0 29.4.5 को प्रेषित की गयी। विवेचना समाप्त की गयी। माननीय न्यायालय द्वारा उक्त अन्तिम रिपोर्ट निरस्त करते हुये अभियोग की अग्रिम विवेचना किये जाने हेतु आदेश पारित किये गये हैं। इस संदर्भ में अभियोग की अग्रिम विवेचना किये जाने के माननीय न्यायालय के आदेश एवं अभियोग से सम्बन्धित अभिलेख की प्रमाणित छाया प्रति थाना कार्यालय से प्राप्त हुई है। तद्नुसार विवेचना ग्रहण की गयी एवं अभिलेखों का अवलोकन किया गया। अवलोकन करने पर पाया गया कि किराये पर विवादित हस्ताक्षर एवं वादिनी के हस्ताक्षर के नमूनों का मिनाल वि0वि0 विज्ञान प्रयोगशाला द्वारा अपेक्षित है। इस संदर्भ में कां0 पैरोकार जितेन्द्र कुमार से जानकारी की गयी। जिसने बताया कि दि0 22.8.06 को वि0 वि0 विज्ञान प्रयोगशाला, आगरा के द्वारा माननीय न्यायालय में उपस्थित होकर विवादित एवं नमूना अभिलेखों का परीक्षण किया जा चुका है। सम्भवतः परीक्षण का परिणाम भी माननीय न्यायालय में प्राप्त हो चुका होगा। परिणाम प्राप्ति हेतु माननयी न्यायालय से अनुरोध किया जायेगा। अभिलेखों के

अवलोकन से यह भी पाया गया कि अभियुक्तगण के कथन अंकित नहीं किये गये है। पूर्ति की जायेगी।"

14. As such aforesaid investigation is wholly illegal and could not have been proceeded on the basis of the order dated 13th March, 2006, which was set aside.

15. On 4th October, 2006, another order was passed by the Judicial Magistrate for proceeding under Section 190 (a) of the Code of Criminal Procedure and the Judicial Magistrate has been directed to proceed with the complaint case in accordance with Sectgion 190 (1-a) of the Code of Criminal Procedure. He has also mentioned that the final report, which was submitted on 29th April, 2005 came up on 13th March, 2006, by which the further investigation has already been set aside in Criminal Revision No. 70 of 2006.

16. Thereafter, another order has been passed by the Judicial Magistrate on 16th October, 2006 to the following effect:-

"पत्रावली पेश हुयी। पत्रावली के अवलोकन से स्पष्ट है कि इस मामले में पूर्व पीठासीन अधिकारी द्वारा दिनांक 13.3.06 की धारा 173 (8) द0प्र0सं0 के अन्तर्गत अग्रिम विवेचना है। थाना गंगनहर रूड़की को आदेशित किया गया था। तत्पश्चात दिनांक 4–10–06 को इस प्रकरण को परिवाद के रूप में दर्ज करने का आदेश पारित किया गया तथा पत्रावली परिवादनी के धारा 200 द0प्र0सं0 के बयान दर्ज करने हेतु नियम की गयी। इसी दौरान विवेचक द्वारा विवेचनापूर्ण करके आरोप पत्र संख्या 150/06 न्यायालय में प्रस्तुत कर दिया गया है। चूंकि

आरोप पत्र न्यायालय प्राप्त हो चुका है। ऐसी स्थिति में अब इस मामले को परिवाद के रूप में आगे बढ़ाये जाने की कोई आवश्यकता नहीं रह गयी है।

अतः मामले के समस्त तथ्यों एवं परिस्थितियों में विवेचक द्वारा प्रेषित आरोप पत्र के आधार पर अभियुक्तगण के विरूद्ध अन्तर्गत धारा 420, 467, 468, 471, 323, 504, 506 भा0द0सं0 में संज्ञान लिया जाता है। प्रकरण को स्टेट केस के रूप में दर्ज किया जाये। अभियुक्तगण द्वारा अभी तक जमानत नहीं करायी गयी है। अतः अभियुक्तगण के समन नियत दिनांक 27–10–2006 के लिये जारी हो। नकलें अविलम्ब तैयार करायी जायें।"

17. Counsel for the applicants has submitted that the aforesaid order was completely in utter disregard of the order passed by the Magistrate concerned on 4th October, 2006 by which the complaint has been registered under Section 190 (a) of the Code of Criminal Procedure and while passing the order dated 19th October, 2006, the Magistrate concerned has not taken into consideration, various orders passed by the Uttaranchal High Court in Criminal Revision No. 51 of 2006 and Criminal Revision No. 70 of 2006 and further that the order dated 4th October, 2006 by which the complaint case has been directed to be proceeded will be substituted by another order dated 16th October, 2006 which the Magistrate has no power in view of the Judgment of the ***Adalat Pasad v. Rooplal Jindal and others 2004 (007) SCC 338.*** The observations made in ***Adalat Prasad*** (supra) are as under:-

"*It is true that if a Magistrate takes cognizance of an offence, issues process without there being any allegation against the accused or any material implicating the accused or in contravention of provisions of Sections 200 and 202, the order of the Magistrate may be vitiated, but then the relief an aggrieved accused can obtain at that stage is not by invoking Section 203 of the Code because the Criminal Procedure Code does not contemplate a review of an order. Hence in the absence of any review power or inherent power with the subordinate criminal courts, the remedy ties in invoking Section 482 of the Code.*"

18. In view of the aforesaid, the Judicial Magistrate has lost the jurisdiction to recall the order dated 4th October, 2006.

19. Counsel for the applicants, therefore, has submitted that the order dated 16th October, 2006 for proceeding for further investigation as required under Section 173 (8) of the Code of Criminal Procedure is wholly without jurisdiction as in view of the fact that further investigation under Section 173(8) has already been quashed in Criminal Revision No. 70 of 2006.

20. Counsel for the respondent no. 2-Sri S.K. Agarwal Sr. Advocate has referred Section 210 of the Code of Criminal Procedure and has submitted his argument that both the complaint case and the F.I.R. case can proceed simultaneously in accordance with Section 210 of

the Code of Criminal Procedure. Section 210 of the Code of Criminal Procedure reads as under:

> **"210. Procedure to be followed when there is a complaint case and police investigation in respect of the same offence.**-(1) When in a case instituted otherwise than on a police report (hereinafter referred to as a complaint case), it is made to appear to the Magistrate, during the course of the inquiry or trial held by him, that an investigation by the police is in progress in relation to the offence which is the subject-matter of the inquiry or trial held by him, the Magistrate shall stay the proceedings of such inquiry or trial and call or a report on the matter from the police officer conducting the investigation.
>
> (2) If a report is made by the investigating officer under section 173 and on such report cognizance of any offence is taken by the Magistrate against any person who is an accused in the complaint case, the Magistrate shall inquire into or try together the complaint case and the case arising out of the police report as if both the cases were instituted on a police report.
>
> (3) if the police report does not relate to any accused in the complaint case or if the Magistrate does not take cognizance of any offence on the police report, he shall proceed with the inquiry or trial, which was stayed by him, in accordance with the provisions of this Code."

21. Section 210 (1) provides that where case has been instituted otherwise than a police report and in the meantime during the course of the inquiry or trial investigation by the police is in progress, the Magistrate shall stay the proceeding of such inquiry or trial.

22. In the present case, the situation is completely different inasmuch as the original initiation of the proceedings was on the basis of the police report i.e. the FIR and thereafter, further investigation was directed, which was also the subject matter of the criminal revision in which the order was quashed and as such there being no separate complaint, question of applicability of Section 210 of the Code of Criminal Procedure does not arise at all in the present case.

23. In view of the aforesaid facts, the order dated 16th October, 2006 is quashed and the Judicial Magistrate is directed to pass fresh order after taking into consideration various orders passed by this Court from time to time and also two criminal revisions, and shall also take into consideration the two suits pending, one for not evicting the applicant by force and another suit for possession. The Magistrate concerned is directed to pass fresh orders after taking into account the aforesaid factors. The matter is sent back to the Judicial Magistrate for passing order afresh in the light of the observations made above.

24. In ***Smt. Husna and others v. State of U.P. and others [2006 (56) ACC 659],*** it has been observed as under:

> *"7. The petition is finally disposed of witht eh direction to the petitioners to appear before the Court concerned within 15 days of passing of this order and if they do so, the Court will permit them to file appearance bonds to his satisfaction for their regular appearance in the case."*

25. However, in view of the order passed in criminal Revision No. 70 of 2006 dated 1st August, 2006, liberty is given to the Magistrate concerned to consider the release of the applicant on their furnishing personal Bond to the satisfaction of the Magistrate concerned.

26. Subject to the aforesaid observations, the matter is sent back to the Magistrate concerned for deciding the same in accordance with law.

27. Application filed under Section 482 of the Code of Criminal Procedure is allowed.

(Rajesh Tandon, J.)

15.12.2006
Rathour